December, 2010

# Improving the Effectiveness of the International Law of Human Trafficking: A Vision for the Future of the US Trafficking in Persons Reports

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Hum Rights Rev
DOI 10.1007/s12142-010-0183-6

# Improving the Effectiveness of the International Law of Human Trafficking: A Vision for the Future of the US Trafficking in Persons Reports

**Anne T. Gallagher**



**Abstract** In 2000, the United States Congress passed the Victims of Trafficking and Violence Protection Act requiring its State Department to issue annual Trafficking in Persons Reports (TIP Reports) describing "the nature and extent of severe forms of trafficking in persons" and assessing governmental efforts across the world to combat such trafficking against criteria established by US law. This article examines the opportunities and risks presented by the TIP Reports, tracing their evolution over the past decade and considering their impact on the behavior of states. In looking to the future, the article focuses on how this influential unilateral compliance mechanism could improve its legitimacy, respond to negative impacts, and better contribute to the international legal regime around trafficking.

**Keywords** Trafficking · Trafficking in persons · International law · Human rights

## Introduction

In 2000, the United States Congress passed the Victims of Trafficking and Violence Protection Act (TVPA) requiring its State Department to issue annual Reports describing "the nature and extent of severe forms of trafficking in persons" and assessing governmental efforts across the world to combat such trafficking against criteria established by US law. The TVPA lays down "minimum standards" for the elimination of trafficking as well as detailed criteria for evaluating the performance of states. The Reports use a ranking system to classify all states reviewed into four tiers of anti-trafficking compliance. Any bottom-tier state, being one that does not

Thanks to Angela Ha for editorial assistance. The opinions expressed in this article are those of the author and should not be taken to represent, in whole or part, those of the organizations with whom she is or has been associated.

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Published online: 01 December 2010

comply with the minimum standards and that is not making significant efforts to do so, may be subject to a range of economic sanctions. Unsurprisingly, the Trafficking in Persons (TIP) Report, issued every year since 2001, has been criticized on a wide range of fronts. Its very existence angers activists and governments alike, who object to the USA appointing itself supervisor and arbiter of a complex international issue that remains both contested and controversial. While firm friends take comfort in the glowing assessments they receive each year from Washington, the usual targets of US disapproval point to their consistently poor ranking as evidence of entrenched bias. Analysts within and outside the US government have focused on the technical quality of the Reports, questioning their empirical basis and identifying serious concerns with regard to both methodology and data. These and many other valid objections have not detracted from the reality of the Reports' considerable and growing influence on the behavior of states and on the direction of the global anti-trafficking movement.

This article examines the risks and opportunities presented by the TIP Reports. "History and Evolution" explains the origins and structure of the Reports, traces their remarkable evolution, over the past decade, and considers how that evolution has mirrored changes in understandings of and attitudes towards trafficking. "Impact, Compliance and Effectiveness" examines the impact of the Reports on the behavior of states. This part notes the essential difference between compliance and effectiveness, highlighting gaps in knowledge and understanding that hamper our collective ability to identify what works and what does not with respect to trafficking. On the strength of a firm conviction that the Reports are here to stay and that there is no credible alternative on the horizon, "The Way Forward" identifies major issues for the future: improving the Reports' legitimacy, and acknowledging and responding to negative impacts.

The underlying premise of this article is that there is something fundamentally wrong with the present situation. The performance of governments with respect to trafficking is currently being assessed, not with reference to the international rules that states (including the USA) have collectively developed and freely accepted, but against criteria drawn up and imposed by US bureaucrats and politicians. I argue that the future credibility and authority of the Reports, and accordingly, their capacity to effect real and lasting change rests heavily on the extent to which they can integrate and promote compliance with international rules and standards.

## History and Evolution

The TIP Reports did not emerge in a legal or policy vacuum but form part of an established tradition of US congressional oversight of the actions of other countries in politically important areas. The most relevant examples deserve brief consideration. In the mid-1970s, Congress mandated the Secretary of State to provide, on an annual basis, "a full and complete report regarding the status of internationally recognized human rights" throughout the world. In response to that direction, the State Department Human Rights Country Reports have delivered increasingly detailed and authoritative analyses of the human rights situation in every country

(US Department of State 2010b). The trajectory of the Reports is illuminating. They endured several decades of trenchant censure during which time there were significant changes in approach and methodology (de Neufville 1986; Poe et al. 2001; Anderson 2002). While they continue to be criticized on both substantive and ideological grounds (Weisbrot 2009; Qian and Yanagizawa 2009), the Reports have become part of the global human rights architecture, accepted by the human rights establishment as "an effective tool for holding governments accountable" (Amnesty International 2010).

Unlike the TIP Reports, the Human Rights Country Reports do not form part of any formal certification process or sanctions regime. Direct precedents for this aspect of the TIP Reports include the Religious Freedom Reports, issued annually since 1999 under congressional mandate, and the International Narcotics Control Strategy Report (Narcotics Control Reports) issued annually since 1987. The enabling legislation for the latter initiative clearly provided the template for the TIP Reporting mechanism. Countries are ranked and those considered "decertified" are subject to congressional sanction (FRAA 2003 Sec. 706). The controversy in which US drug policy seems permanently mired is reflected in the nature and depth of criticisms of the *Narcotics Control Reports*. Analysts have focused, in particular, on politicization of the certification process and the "vague and subjective thresholds" used to categorize countries (Friman 2010: 85).

The United States government was at the front line when trafficking emerged (or re-emerged) as an issue of global concern in the mid-1990s. At that point, international and domestic US attention was focused squarely on cross-border trafficking for sexual exploitation, particularly of women and girls from Central and Eastern Europe and South East Asia to wealthy destination countries of Western Europe and North America. The TVPA was signed into law on October 11, 2000, 2 months before the adoption of the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol 2000), the first international treaty on trafficking in more than 50 years. The TVPA established a system whereby the efforts of other countries to address trafficking were to be examined and assessed. The TVPA requires the State Department to issue annual reports describing "the nature and extent of severe forms of trafficking in persons" in countries experiencing a significant trafficking problem and assessing governmental efforts to combat such trafficking against criteria established by US law. From 2009, the assessment procedure was extended to cover all countries of origin, transit, or destination, not just those deemed to have "a significant trafficking problem." From 2010, the Reports include a self-assessment of US performance, a move presumably intended to lend additional legitimacy to the reporting process while responding to the most obvious of all criticisms that had been leveled against it in the past.

The TVPA, as amended at various points over the past decade (TVPA), establishes "minimum standards" for the elimination of trafficking as well as criteria for evaluating performance. Governments are required, at a minimum, to: (1) prohibit and appropriately punish trafficking; and (2) make serious and sustained efforts to eliminate such trafficking. In evaluating efforts in this latter regard, the following indicia are stipulated: (1) whether the government vigorously investigates, prosecutes, and punishes trafficking; (2) whether it protects victims and encourages their participation

in the investigation and prosecution process; (3) whether it has adopted preventative measures such as public education, birth registration, control of nationals deployed abroad in peacekeeping and similar operations, and measures aimed at preventing forced labor and child labor; (4) whether it cooperates with other governments in investigations and prosecutions; (5) whether it extradites (or is attempting to enable extradition of) traffickers; (6) whether it monitors migration patterns for evidence of trafficking and responds to such evidence in an appropriate manner; (7) whether it investigates, prosecutes, and takes appropriate measures against the involvement of public officials in trafficking; (8) whether the percentage of victims of trafficking that are non-citizens is insignificant; (9) whether the government has taken measures to address demand for trafficking related to commercial sex acts and involvement of nationals in sex tourism; (10) whether it has achieved appreciable progress as measured against the previous year's assessment; and (10) whether it has monitored and provided information to the US government on its national response to trafficking (US Department of State 2010a).

The State Department used the compliance levels of the TVPA to create a system of rankings based on three tiers. Tier One is for countries in full compliance with the minimum standards set out above, Tier Two for countries making an effort but not yet fully compliant, and Tier Three for those countries that were failing on both counts. Subsequent amendments laid the ground for the creation of an additional category, "Tier Two Watch List," applied to countries that, owing to the severity of the problem or failure to provide evidence of progress, are considered to be on the lower edge of Tier Two classification. Tier Two Watch List countries are subject to special scrutiny and, in the absence of a presidential exemption, are downgraded to Tier Three after two consecutive years on the Watch List. Under the TVPA and its various amendments, the President is authorized to deny the provision of non-humanitarian, non-trade-related assistance to any Tier Three country. In addition, such countries risk US opposition to their seeking and obtaining funds from multilateral financial institutions, including the World Bank and the IMF. The annual Reports are used as a basis for determining whether, and to what extent, sanctions are to be imposed or assistance provided. Sanctions can be avoided through a "national interest" waiver or a determination that a waiver (or partial waiver) is required to promote the purposes of the TVPA or to avoid significant adverse effects on vulnerable populations.[1]

The first TIP Report was released in June 2001. It was a slight and somewhat confused document, presenting an obligingly easy target for criticism (Gallagher 2001). In keeping with the narrower view of trafficking widely accepted at that time, the Report's cursory analysis focused heavily on trafficking for sexual purposes, ignoring other egregious forms of exploitation that met both the international and US definition. The distinction between trafficking and related phenomena such as

[1] In 2009, 17 countries were placed in Tier 3. In September of that year, the U.S. President determined that two of these countries would be sanctioned without exemption (Cuba and North Korea, both already under sanction) and that a further six (Burma, Eritrea, Fiji, Iran, Syria and Zimbabwe, most of which were already under sanction) would be partially sanctioned. Sanctions against the remaining eight Tier 3 countries (Chad, Kuwait, Malaysia, Mauritania, Niger, Papua New Guinea, Saudi Arabia and Sudan) were subject to a national interest waiver (Wyler and Siskin 2010). In 2010, 13 countries were placed in Tier 3. At the time of writing no determination had yet been made about sanctions against these countries.

migrant smuggling was not uniformly understood or upheld. The document confidently cited unverified and unverifiable statistics, declining to acknowledge the complexity of the trafficking phenomenon and the immense difficulties involved in obtaining and synthesizing credible data. Its self-proclaimed "rigorous" evaluative methodology appeared to be little more than a crude information-collection exercise, delegated to untrained embassy officials. Failures to identify sources of information and inconsistencies in applying the evaluative criteria lent weight to claims of a suspect correlation between general US government attitude towards a particular country and the way in which it judged that country on the issue of trafficking.

The shallowness and brevity of analysis in that first Report was at least partly dictated by events on the ground. In 2001, there were few national laws against trafficking and almost no recorded prosecutions. Victims were either unrecognized and unprotected or specifically targeted and criminalized. Cooperation between countries on this issue was non-existent. The international legal framework around trafficking was very new; key definitions and norms were yet to be internalized or even properly understood. Ten years later, the situation is starkly different. The Trafficking Protocol, the pre-eminent international legal agreement on this issue, has been ratified by 142 states. The obligations set out in the Protocol have been clarified and, in some cases, extended by subsequent treaties, policy instruments, and interpretive materials. While national implementation of international rules remains uneven and incomplete, there has been considerable progress. Most countries have now criminalized trafficking according to the international legal definition, thereby confirming the expansion of the concept to potentially embrace virtually every situation in which individuals are severely exploited for private profit.

The TIP Reports have undergone a similarly dramatic shift. The most significant changes in the most recent Reports (US Department of State 2009, US Department of State 2010a) compared with the 2001 predecessor include those relating to:

- Geographic scope: The first Report briefly evaluated 83 countries deemed to be states of origin, transit, or destination for "a significant number" of victims of trafficking (generally, more than one hundred). The "significant number" threshold was removed for the 2009 Report, which was tasked to assess *all* countries of origin, transit, and destination, and covered 173 countries as well as two additional "special cases" (Haiti and Somalia). Two more states (including, for the first time, the USA) were added in 2010, bringing the total number to 177.
- Understanding of the trafficking phenomenon: The Reports now reflect a State Department view that movement is not required for trafficking to occur (CdeBaca 2010). While the legal implications of that view cannot be fully explored within the confines of this article, it appears that the ambiguous definitions of "trafficking" in both the TVPA and international law are being interpreted in a way that maximizes their potential application to situations of private exploitation. The broader, narrative focus of the Reports has expanded beyond the cross-border trafficking of women and girls for sexual exploitation to embrace a wide range of trafficking end-purposes including forced labor, bonded labor, debt bondage, forced marriage, forced begging, exploitative adoption, child sex tourism, child soldiering, and organ removal. While cross-border

trafficking into sexual exploitation continues to be a major focus of individual country assessments, internal exploitation and end-purposes of trafficking other than sexual exploitation are now routinely identified.

- Level of country analysis: Individual country assessments now address all minimum standards and criteria and specific recommendations are provided. The assessments appear to generally support the grading awarded and there is some effort to explain tier movement. A graph indicates tier movement over the life of the Reports.
- Introduction of thematic analysis: The Reports now include sections that outline major forms of trafficking and consider contentious or cross-cutting issues such as the role of parents in child trafficking, the detention of adult victims in shelters, trafficking in government procurement, and the relationship between trafficking and domestic violence. The 2010 Report takes thematic analysis one step further by introducing standards and principles in relation to certain aspects of the national trafficking response, for example, legislation and the provision of shelter.
- Use of data and statistics: While limitations on data are now obliquely acknowledged, the Reports continue to include secondhand information that is not fully referenced or cited. In 2009, for the first time, the State Department declined to provide its own estimates of the global scope of trafficking, drawing instead on data provided by the International Labour Organization. The 2010 Report uses, without attribution or explanation, the same ILO estimate to extrapolate estimates of trafficking prevalence and victim identification rates. Country assessments no longer cite estimated numbers of victims although unverified estimates provided by others are still quoted without qualification. Governments are required, under threat of downgrading, to provide data and other information to State Department officials on investigations, prosecutions, convictions, and sentences. There is still little acknowledgement of the unreliability of much of the official information so provided.
- Methodology: Recent Reports claim, and to some extent reflect, a more rigorous methodology for information collection and analysis. A system of outreach and consultation was recently established, providing interested and informed parties with the opportunity to contribute their views and insights. It is unclear how this new system operates in practice and to what extent it influences the direction of country assessments.
- Approach to prostitution: Since their inception, the Reports have regularly conflated trafficking with prostitution. They have also been used as a vehicle for advancing what many have perceived to be an aggressive US government campaign against prostitution (Berman 2006; Chuang 2006; Soderlund 2005; Weitzer 2007). The 2009 Report began to modify this approach, while maintaining a strong focus on prostitution as the site of much trafficking-related exploitation. The 2010 Report states that: "prostitution by willing adults is not human trafficking regardless of whether it is legalized, decriminalized or criminalized" (US Department of State 2010a: 8). However, the same Report notes that, as required under the TVPA, the Reports evaluate the efforts of those countries with legalized prostitution to reduce demand for commercial sex "as part of its assessment of the countries' serious and sustained efforts to eliminate severe forms of trafficking in persons" (US Department of State 2010a: 8).

- References to international law and standards: The Trafficking Protocol is cited increasingly often and country narratives now regularly note whether the state under assessment is party to the Protocol. Other relevant treaties are generally not referred to in either thematic analyses or country narratives. A table of ratifications of some relevant treaties is provided.

## Impact, Compliance, and Effectiveness

Recent changes to the TIP Reports have not been universally welcomed. For those who consider the campaign against trafficking to be principally about prostitution and sexual exploitation, the increased focus on trafficking for labor exploitation and the 2010 affirmation that trafficking and prostitution are not the same thing represent a betrayal of the TVPA (Horowitz 2010). Significantly, only the TVPA is cited as an authority for such criticisms. International law, including international human rights law, is clear on the point that the end-purposes of trafficking extend well beyond sexual exploitation. International law also affirms that states remain free to regulate adult prostitution as they see fit, subject to constraints imposed by human rights law. The failure of the Reports to align themselves more closely to international norms and standards provides dangerous ammunition to those who seek to manipulate the campaign against trafficking to suit narrow political and ideological agendas.

Of much greater significance, however, is the question of the Reports' impact on the behavior of states. Specifically, to what extent has the USA secured compliance with its stipulated minimum standards? The issue of compliance is a complex one, and the limited research undertaken thus far (Freidrich et al. 2006; USGAO 2006; Wyler and Siskin 2010) provides little useful guidance. There is an understandable temptation, to which the State Department itself has yielded (USGAO 2006; Warren 2010), to use movement within the grading system as evidence of impact. A country that has advanced from Tier 3 to Tier 1, for example, may be identified as having responded to the pressure or threat of sanctions as well as to the "naming and shaming" effect that accompanies highly public negative assessments of this kind (Friman 2010). However, such an approach ignores the myriad factors that affect a country's grading in a particular year as well as the many internal and external influences, beyond the Reports, on that country's response to trafficking. Ratification of the Trafficking Protocol, for example, may be the primary impetus for a state to criminalize trafficking. The Protocol may also have contributed to the internalization of norms that are simultaneously being advocated through the US TIP reporting process. Pressure from neighboring states could lead to changes in willingness to engage in cross-border cooperation. The provision of technical assistance through a bilateral aid program could enhance criminal justice capacity to investigate and prosecute trafficking cases. The presence of strong victim support agencies will likely have a significant bearing on the rate of victim identification as well as the extent to which states have moved to protect and assist those who have been trafficked.

Individual states can most accurately assess the effect of the TIP reporting process on their own behavior. However, states cannot be relied upon to provide helpful or

honest insight in this regard. There is little discernible benefit to be gained by a government admitting that a particular initiative or response was prompted by a criticism, assertion, recommendation, or grading contained in the TIP Report. Most countries provide no official comment or reaction. Some respond positively to an elevation in their assessed status (Government of Mauritius 2009). Others, often those identified as belonging to Tier 3, release statements disagreeing with the State Department assessment (AFP 2009; Garcia 2006; Singapore MFA 2010). A few claim that they are immune to the Reports (China Post 2009). Of course, there is considerable anecdotal information available to support the contention that the TIP Reports have had a significant impact on the way in which individual countries have responded to trafficking. Three examples illustrate this contention and underline the many ways in which attribution can be complicated.

After sinking to Tier 3 in 2004, Nigeria is now comfortably ensconced in Tier 1, one of the few major countries of origin for victims of trafficking (and the only African state besides Mauritius) to have achieved this elevated status. Nigeria appears to have diligently followed most of the recommendations made in consecutive TIP Report assessments. In addition to adopting a comprehensive law and establishing a high-profile anti-trafficking organization to coordinate the national response, Nigeria also took a strong, public line on the link between prostitution and trafficking that mirrored the US position. With considerable external assistance, including from the USA, the Nigerian government made changes to its criminal justice response and introduced victim support measures. The 2009 Report explained Nigeria's elevation to Tier 1 by noting that "[o]ver the past year, the Government of Nigeria more than doubled the number of trafficking offenders convicted, while it improved assistance given to victims, demonstrated strong awareness-raising efforts, and increased funding to its anti-human trafficking organization" (US Department of State 2009: 226). At the official press briefings for the release of the 2009 report, Nigeria was hailed as a TIP Report success story—a model for the Africa region and the wider world (Clinton 2009; CdeBaca 2009).

Australia was excluded from the first few TIP Reports, and its inclusion, in 2004, was met with some dismay. The Australian government had, only a few months previously, formally acknowledged the existence of a problem and announced a raft of measures to deal with trafficking. While it could be argued that the Damocles sword of the TIP Report triggered that acknowledgement and the accompanying reforms, other factors, including NGO advocacy and media exposure of exploitation of foreign workers in Australia's sex industry, were also at work (McSherry 2007). Despite entering the report at the highest tier level, it took Australia several years to meet the minimum standards. Between 2004 and 2007, new legislation was passed, a special visa regime and support system was created for foreign victims, a team of specialist investigators was established within the national police force, and significant resources were invested in training, public education, and outreach (Parliament of Australia 2008; Australian Government 2009; Australian National Audit Office 2009). While Australia's top-tier ranking has never changed, on-going scrutiny through the annual TIP Reports appears to have contributed to important refinements in the response, such as increased attention on trafficking for labor exploitation and the elimination of a provision extending immigration and other

support only to those victims who are deemed useful (and agree to cooperate) in the prosecution of their exploiters (Australian Government 2009).

The inaugural TIP Report correctly noted that Malaysia did not recognize, criminalize, or prosecute trafficking cases (US Department of State 2001). Exploitation of foreign workers, the major manifestation of trafficking in Malaysia, was dealt with through laws related to prostitution and illegal immigration. Relatively minor changes appeared to explain Malaysia's upgrade to Tier 2 the following year, a position it retained until 2006 when it was downgraded to the Watch List. Failure of the Malaysian government to meet any of the minimum standards with regard to legislation, prosecution, and victim protection were cited as reasons for a further downgrade to Tier 3 in 2007. At this point, Malaysia's response to trafficking abruptly changed direction. A comprehensive law was developed and, with no public discussion, quickly adopted. Shelters for victims were established. Malaysia's criminal justice agencies sought and received specialist training in the investigation and prosecution of TIP cases (ASEAN 2007) and several prosecutions were initiated. Small, but important steps were taken in relation to cross-border cooperation. These "significant efforts" (US Department of State 2008: 173) were rewarded and in 2008 Malaysia was returned to the Watch List. However, it slipped back to Tier 3 in 2009. This relapse appeared to be directly related to the release of a highly critical US congressional report documenting the trafficking of Burmese migrants for forced labor in Malaysia (US Senate CFR 2009). The following year, Malaysia was again returned to the Watch List, due to evidence of "a greater commitment to address human trafficking" (US Department of State 2010a: 223). The government reacted quickly and positively to this development, with the Home Minister stating publicly that "Malaysia's upgraded status is a recognition of what we have been doing so far to tackle the issue of human trafficking in the country. I must congratulate the ministry's officers and other relevant ministries in helping Malaysia achieve this important stage of our efforts to stop human trafficking crimes" (Rahman 2010).

In all three cases, it is evident that the TIP Reports have exercised a strong, if not decisive influence on the way in which states have responded to trafficking. Beyond this largely intuitive conclusion, it remains difficult to assess the extent to which changes can be directly or indirectly attributed to the Reports and the political process of which they form a central part. The problem is partly one of timing. The mechanism established under the TVPA commenced almost immediately after adoption of a hugely influential international treaty on trafficking: one that created legal obligations that, in many respects, echoed the minimum standards established by the TVPA. The Trafficking Protocol generated a range of institutions, instruments, procedures, and initiatives that have played some role in helping to shape national trafficking responses (Gallagher 2009).

The conclusion on compliance is therefore less than satisfying. For any individual working with or within national governments on this issue, the power of the TIP Reports is indisputable. However, that conclusion should be tempered by the knowledge that the Reports are just one component of the international landscape around trafficking, reflecting, reinforcing, and feeding off other initiatives and other actors. A closely related aspect that deserves further examination concerns motivation: what drives state responses to the TIP Reports? Are the actions of

Nigeria, Australia, or Malaysia simply the product of a rational cost-benefit calculation of national interests? If so, what are the factors shaping that perception of self-interest? Considerations of reputation and of consequences (such as sanctions) may both play a part, but it is evident that their relative importance will differ from country to country and from time to time. To what extent is compliance affected by the perceived legitimacy (or illegitimacy) of the TIP reporting process itself? It is not unreasonable to infer that there will be a relatively greater willingness to accept and internalize rules that are considered to be clear and fair and emanating from accepted processes (Raustiala and Slaughter 2002; Cleveland 2002). To the extent that the TIP reporting mechanism is considered intrusive, unfair, and out of step with international norms, its ability to capitalize on a "legitimacy effect" will inevitably be compromised. It follows that a normative convergence between the national and international, explored in more detail in the following section, will contribute to improved compliance in both arenas.

Of course, *compliance* is not the same as *effectiveness*. Measuring the extent to which state behavior is influenced by the TIP Reports and complies with its specific standards is one thing. Ascertaining the degree to which the Reports actually impact the underlying problem of trafficking is a different challenge. In 2006, the US Government Accountability Office found that "there is little or no evidence to indicate the extent to which different types of efforts—such as prosecuting traffickers, abolishing prostitution, increasing viable economic opportunities or sheltering and reintegrating victims—impact the level of trafficking" (USGAO 2006: 25). A report released by the same agency a year later confirmed this grim finding (USGAO 2007). In short, the entire anti-trafficking edifice is built on a foundation of untested assumptions. It is not to the credit of the USA, or indeed to the many governments, intergovernmental organizations, NGOs, and other actors operating in the crowded and well-resourced arena of "counter-trafficking," that this situation remains unchanged and virtually unchallenged.

## The Way Forward

Ten years after their inception, it is clear that the TIP Reports are here to stay. Support for the Reports has, under a series of very different administrations, remained uncommonly constant, and there is nothing to indicate that this will change in the coming years. If one accepts that public scrutiny of trafficking-related exploitation is a good thing and that monitoring of state responses to trafficking can potentially operate to address such exploitation, then, the assured future of the TIP Reports should be reason for optimism. The dearth of credible alternatives lends additional weight to that position. Several examples serve to illustrate this point. In 2009, the United Nations Office on Drugs and Crime (UNODC) released its monumental Global Report on Human Trafficking. The report was billed as providing "an unprecedented view of the available information on the state of the world's response to trafficking, including near-comprehensive data on national legislative and enforcement activity" (UNODC 2009). While it contains some interesting information on criminalization, the criminal justice response and assistance to victims, the UNODC Report's usefulness as a source of knowledge,

or even of advocacy, is severely constrained. Methodological and analytical weaknesses are revealed most starkly in several of the report's more bizarre conclusions: that almost 80% of trafficking is for sexual exploitation, for example, or that women comprise the overwhelming majority of traffickers. These claims are not "fact" in any sense of the word, reflecting nothing more than current self-reported patterns of investigations and prosecutions. It is disingenuous in the extreme to present those patterns as free of distortion and as representative of the actual global situation. Despite these and other significant weaknesses, the UNODC Report has been subject to no critical review or analysis: a further poor reflection on the state of critical analysis and scholarship in the area of counter-trafficking.

Another much more important (if presently hypothetical) rival for the TIP Reports is the reporting mechanism established under Article 32 of the UN Convention against Transnational Organized Crime (Organized Crime Convention 2000), the parent treaty of the Trafficking Protocol. While the "Conference of Parties" (COP) for that Convention was not originally mandated to deal with trafficking, that omission was remedied in 2004 when COP functions of monitoring, information exchange, and cooperation were extended to the Trafficking Protocol. The COP is thus now empowered to request and receive information on states parties' implementation of the Protocol and to make recommendations to improve the Protocol and its implementation. A review of the voluminous and highly repetitive documentation produced for the COP and its various working groups confirms that the self-reporting procedure is a relatively crude mechanism for promoting or measuring compliance. Reporting rates are low, and the information received from governments is uneven, shallow, and often ambiguous. There is no opportunity to seek clarification from, or for dialog with, state parties. The analytical compilations of responses prepared by UNODC (the over-strained and under-resourced COP Secretariat) provide, at best, a highly generalized picture of compliance patterns and trends and do not amount to even a cursory review of state party performance (Gallagher 2010).

It is unclear whether recent efforts to improve this situation, including the establishment of a dedicated trafficking in persons working group within COP, will bear fruit. The prospect of states parties to the Organized Crime Convention and its Trafficking Protocol being made subject to a rigorous oversight mechanism—or even a procedure capable of evaluating their performance of key obligations—appears to be remote. States involved in the review of current arrangements have made clear that while they are willing to consider establishing a mechanism that is "transparent" and "efficient" (UNCOP 2009: 4), there are limits on what would be acceptable. For example, the focus of any such mechanism should not be on compliance per se, but rather on helping to develop national policies for implementation as well as technical assistance and international cooperation initiatives (UNCOP 2009). States parties have also declared that any oversight mechanism established under the Convention must also be "non-intrusive, impartial, non-adversarial, non-punitive and flexible. In addition, it should not criticize or rank states or regions but rather contribute to problem solving. It should furthermore respect the sovereignty of States" (UNCOP 2009: 4). Regrettably, that emphatically deferential view, echoed in a recent G77 Statement to the UN Crime Commission (G77 2009), appears to be shared by civil society groups who, had it not been for the experience of the US mechanism, might have been expected to support a more

rigorous approach to monitoring states parties' international legal obligations with respect to trafficking (GAATW 2009).

The above analysis makes clear that, for now, the TIP Reports are not displacing a potentially superior alternative or performing a function that could be better discharged by the international community. Without the Reports, our collective knowledge of trafficking-related exploitation would likely be less; individual governments would likely have greater control over the flow of information that properly belongs in the public domain; and even the most egregious failure on the part of a state to deal with trafficking-related exploitation would likely come at little reputational or other cost. For the committed multilateralist, such conclusions are cause for sober reflection. However, a belief in and commitment to strengthening the international system are not incompatible with a desire to see the kind of changes in the TIP Reports that would allow them to play a greater role in exposing exploitation and calling states and others to account.

The balance of the article sets out a list of specific suggestions for improving the quality of the Reports. Two most of the important themes are maximizing the legitimacy of the Reports and acknowledging negative impacts.

## Maximize the Legitimacy of the Reports

The more legitimate the TIP Reports are (or are perceived to be), the easier it will be to secure positive changes in state behavior. The extent to which the Reports are perceived to be a fair and accurate reading of the actual situation is critical to legitimacy, and it is in this area that substantial progress has been made. Even those who continue to grumble about political hubris and self-righteousness generally agree that individual country assessments are "thorough and largely consistent with facts as observed, reported by the media and examined in other comprehensive Reports on the same issue" (Baroud 2009). It is essential that the higher standards secured over the past several years continue to be maintained. At the same time, expectations should be grounded in an understanding that the Reports are political creatures, produced through a political process and serving specific political ends. From this perspective, it is naïve to expect that country narratives will always be able to maintain an objective distance from the two sharp ends of US foreign relations policy. Key allies will likely need to underperform more flagrantly than less valued ones to be bumped off Tier 1. Political and ideological opponents of the USA may never be moved from Tier 3, no matter how much they try to conform to the TVPA minimum standards.

Quality and use of data: While there has been some retreat from the earlier tendency to cite unverified and unverifiable data and statistics, this could be taken further through a frank admission of the well-known problems and pitfalls associated with quantifying the extent of the trafficking problem (USGAO 2006; Savona and Stefanizzi 2007; Feingold 2010; Ali 2010) and the limits of current knowledge. Such an admission could operate as a counterweight to the current unhealthy and unhelpful fixation on numbers and statistics that appears to be an endemic affliction of intergovernmental agencies, NGOs, researchers, and academics working in this area. It may also help to stem the widespread manipulation of data to serve narrow policy goals or organizational requirements.

An open acknowledgment of data limitations should extend to the information contained in the Report itself. The reporting and ranking process is not "objective" in the scientific sense. Attempts to present the assessments and the resulting rankings in this way creates what has been aptly called "an imaginary of concreteness" (Warren 2010: 121) that obscures the reality of variation in the quality of information and the capacity of US officials to verify and correctly interpret the data it does manage to obtain. It also hides the elusiveness of trafficking itself: we do not yet fully understand, for example, when or how exploitative work morphs into trafficking, or when a migrant worker in a difficult situation becomes a victim of trafficking. A document such as the TIP Report should not be presented as a definitive statement of fact that can be relied upon by, for example, national refugee determination agencies in deciding whether or not a victim of trafficking has a valid claim for asylum (Saito 2007; Dorevitch and Foster 2008).[2]

Convergence with international norms and criteria: More than anything else, improving the legitimacy of the TIP Reports will require the United States government to work actively to link the criteria by which states are assessed to relevant international legal norms. The development of a robust international legal framework around trafficking has been a recent and remarkable success story of international law (Gallagher 2009). The vast majority of states are now parties to one or more treaties that set out with an unprecedented level of particularity and detail their obligations with respect to the prevention of trafficking, the protection of victims, and the prosecution of perpetrators. Those instruments are supplemented by a raft of widely accepted international human rights treaties dealing with matters that are directly relevant to trafficking and national responses—including the rights of children, the rights of women, rights relating to work and freedom of movement, and prohibitions on forced labor, child labor, forced marriage, and enslavement.

While there is significant normative convergence between these international rules and the minimum standards laid down by the TVPA and subsequently elaborated by the State Department, this does not reach the point of full symmetry. For example, there are important differences between the US definition of "trafficking in persons" and that which has been accepted in international law (Gallagher 2010). The prohibitionist stance with respect to prostitution enshrined in the TVPA and reflected in the Reports is at odds with international law, which does not require states to criminalize prostitution. The TVPA criteria also fail to reflect rights and obligations that do not relate solely or specifically to trafficking but are nevertheless critical to an accurate assessment of the legality and quality of national responses. The right to a fair trial and the obligation to provide access to remedies are just two of many examples. Even in situations where differences between the TVPA standards and international law do not have a great practical impact, the very fact of such differences serves to underline the unpalatable and intrinsically unreasonable reality that states are being judged—not with reference to the

[2] A caveat contained in the introduction to the annual Narcotics Control Report ("Although the Department strives to provide accurate information, this report should not be used as the basis for determining legal rights or obligations under US or foreign law", U.S. Department of State 2010c: 3) could provide a useful template in this regard.

international rules that they have helped to develop and have freely accepted—but against criteria established unilaterally by the US government.

### Acknowledge and Monitor Risks and Negative Impacts

"Collateral damage": Measures taken in the name of addressing trafficking can have an adverse impact on individual rights and freedoms. Throughout the world, trafficked persons and those believed to have been trafficked are routinely detained in jails, immigration centers, and shelter facilities (Gallagher and Pearson 2010). Victims of trafficking are commonly prosecuted for status offenses such as prostitution, illegal immigration, or illegal work (GAATW 2008; Special Rapporteur on Trafficking 2009). Some states have used the threat of trafficking to justify legislative, administrative, or other measures aimed at limiting labor emigration (Oishi 2005; Special Rapporteur on Violence against Women 2000). Victims of trafficking in danger of reprisals or re-trafficking are forcibly repatriated, sometimes on the strength of information contained in the TIP Reports (Saito 2007; Dorevitch and Foster 2008). Assistance and support to victims is often conditional on their agreeing to cooperate with authorities (GAATW 2007; 2008; Special Rapporteur on Trafficking 2009). Anti-trafficking raids and rescues (increasingly conducted by foreign vigilantes including some supported by the US government and prominent US philanthropists) raise troubling ethical and legal questions that have yet to be properly addressed (Soderlund 2005; Augustin 2007; Thrupkaew 2009). Like trafficking itself, the negative fallout from interventions is often highly gendered. The detention of victims of trafficking in shelters and welfare facilities, for example, is invariably directed against women and girls, compromising not just the right to freedom of movement but also the prohibition on discrimination (Gallagher and Pearson 2010). Emigration restrictions justified with reference to the anti-trafficking imperative are discriminatory in both intent and impact, being limited to a group defined by its sex (always female) and often also age (Oishi 2005; Special Rapporteur on Violence against Women 2000).

Rights of suspects: The danger that suspects' rights will be trampled on in the "war against trafficking" is not a remote one. Even those states most attached to the rule of law may be tempted to compromise the rights of individuals suspected of certain high-profile crimes, including organized crime and migrant smuggling with which trafficking is often associated. External and internal pressures on criminal justice agencies to visibly respond to trafficking present an additional risk factor that has a particular resonance in this context. Such pressures can have especially unfortunate consequences in states with underdeveloped criminal justice systems, where rules of evidence and procedure already fall short of international standards (Gallagher and Holmes 2008). Unfair trials, distorted targeting of offenders (e.g., of low-level "enablers," such as recruiters or transporters, rather than those directly involved in exploitation), and disproportionate penalties are a reality of the criminal justice response to trafficking in many parts of the world.

Specific implications for TIP Reports: The 2009 Report was the first to prominently highlight negative impacts of anti-trafficking responses such as victim detention and criminalization. The 2010 Report continued a focus on these two

issues, articulating "core principles for shelter programs" and "ten troubling governmental practices" including penalization of victims, ill-conceived raids of worksites or brothel districts, and emigration/immigration restrictions enacted in the name of addressing trafficking "for an entire country or nationality" (but curiously, not on the basis of sex) (US Department of State 2010a: 23, 31). Unfortunately, this new and welcome focus on negative impacts rarely moves beyond the introductory sections to the individual country assessments. The likely explanation is that the broader danger of "collateral damage" inherent in many anti-trafficking interventions does not figure at all in the TVPA minimum standards or evaluative criteria. In other words, it is only through its introductory narratives that the State Department has been able to identify these critical issues. It is essential for the credibility of the national assessments that some way be found to not only affirm that state responses to trafficking must not violate established rights or obligations, but also to examine state practices against this standard. That will require careful and consistent attention to international norms that relate to matters such as the prohibition on discrimination, the right to freedom of movement (including the right to leave one's country and to return), the prohibition on arbitrary detention, the right to a fair trial, the right to seek asylum from persecution, and the obligation to provide access to remedies for violations of human rights. It is these basic and universally accepted norms that provide essential criteria against which state responses to trafficking should be monitored and evaluated.

The Reports can also do a great deal more to promote the rule of law and the right to a fair trial. A nuanced and refined analysis of the quality of the national criminal justice response to trafficking would view quantity of prosecutions as only one of many positive indicators of performance. It would draw on a sample of cases to identify: (1) the degree to which end-exploiters are targeted and prosecuted; (2) outcomes (sentences, victim compensation, asset confiscation, etc.); and (3) situations in which trafficking-related prosecutions have not met international criminal justice standards. The State Department's own Human Rights Reports could be an important source of information on the quality of the national criminal justice response and its capacity to protect basic rights. Qualitative analysis of this kind should be extended to other aspects of the trafficking response such as victim protection and assistance. This could involve, for example, assessing the nature, level, and impact of support provided to victims rather than simply the number of shelters or available shelter places.

## Conclusions and Recommendations

There can be no doubt that the TIP Reports have exercised a profound influence over the way in which states and others understand and respond to trafficking. From an international legal perspective, the impact and implications of the Reports are especially startling and unsettling. Each and every state, irrespective of its relative power, position, or adherence to a particular treaty is now subject to close and continuing scrutiny. A verdict, with potentially serious consequences not generally available under international law, is then pronounced. Governments work hard to prepare themselves for this annual examination and, almost without exception,

appear to care very deeply about the outcome. While one may prefer a different, more inclusive and more equitable political reality, these developments should nevertheless be welcomed, not least because of the lack of a credible alternative. The international machinery available to expose the many ways in which individuals exploit each other for private profit, to identify government toleration of or complicity in that exploitation and to evaluate national responses is weak and highly compromised. The external compliance machinery created through the TIP Reports explicitly recognizes that governments bear a responsibility to prevent trafficking and related exploitation, to end the current high levels of impunity enjoyed by traffickers, and to protect and assist victims. Attempts to persuade governments to take these obligations seriously should not fall victim to unbridled cynicism or reflexive anti-Americanism: they deserve support and encouragement.

However, along with its capacity to influence positive change, the Report has demonstrated an alarming power to exacerbate negative impacts of anti-trafficking interventions, to nurture destructive and polarizing debates on seemingly intractable issues such as prostitution, and to damage the coherence and authority of an important and widely accepted international legal regime. These are serious risks. They deserve to be openly acknowledged and carefully managed. The US Congress and the State Department have thus far shown a remarkable willingness to adapt the reporting process to take account of new understandings and changed policy preferences. The following is a list of recommendations that, in the present author's view, address the most pressing and significant challenges facing the US as it seeks to consolidate its leadership position in the global effort to identify and eradicate trafficking.

Recommendations for future Reports:

The State Department should:

- Be explicit about the methodology of data collection and analysis and the limitations of the data set. Openly acknowledge obstacles to securing reliable data. Reject costly and unproductive efforts to develop a global estimate of trafficking. Be wary of estimates generated elsewhere.
- Warn against use of the Report as the sole or primary source of authority for critical decision-making (for example, with respect to refugee determination procedures).
- Revise criteria to establish an explicit link with international legal standards by which most states are bound. This should include full and unequivocal acceptance of the international legal definition of trafficking as well as greater emphasis on rights of protection and assistance, the right of access to remedies, the special rights of child victims, rights of suspects, the obligation to impose effective and proportionate sanctions, the obligation to ensure anti-trafficking measures do not violate the prohibition on discrimination, the right to freedom of movement, and other important rights frequently implicated in anti-trafficking.
- Further support the international legal response to trafficking by actively encouraging ratification and effective implementation of key instruments including the Organized Crime Convention and its Trafficking and Migrant Smuggling Protocols, regional trafficking treaties, and core human rights and refugee treaties.

- Openly acknowledge the danger of "collateral damage" inherent in many anti-trafficking interventions and the related danger that states may manipulate political momentum against trafficking to pursue other policy objectives such as immigration control or repression of a particular social or ethnic group. Clearly identify instances and perpetrators of such damage or manipulation and make specific recommendations with respect to this issue in individual country analyses.
- Promote the rule of law and the right to a fair trial by focusing on the quality of the national criminal justice response: reject mere quantity of prosecutions as the major positive indicator of performance; and undertake at least limited case analysis with a view to ascertaining: (1) the degree to which end-exploiters are targeted and prosecuted; (2) outcomes (sentences, victim compensation, asset confiscation, etc.); and (3) situations in which trafficking-related prosecutions have not met international criminal justice standards.
- Extend qualitative analysis to other aspects of the trafficking response such as victim protection and assistance. For example, seek to assess the nature, level, and impact of support provided to victims rather than the number of shelters or available shelter places.
- Encourage critical and open debate on prostitution and the sex industry and their links to trafficking and related exploitation: expose exploitation, abuse, and discrimination rather than mandating (or promoting) a particular legal or policy response that goes beyond what is required of states under international law.
- Accept limits of current knowledge and experience in relation to "what works" when it comes to addressing trafficking. Support the development of tools, standards, and procedures to measure the impact and effectiveness of anti-trafficking interventions.
- Consider producing the report every 2 years. Annual Reports are inevitably highly repetitive. They also curtail opportunity for in-depth analysis and for states to respond adequately to recommendations. An interim report could be issued to maintain pressure for change and/or highlight particular developments or concerns.

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